PP

v.

PREMAKUMAR BALAN & ANOR

HIGH COURT MALAYA, KANGAR
ZAMANI A RAHIM JC
[CRIMINAL TRIAL NO: 45A-02-2005]
10 DECEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - Common intention, whether established - Whether pre-arranged plan to traffick cannabis established*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Admissibility of evidence of test fitting of clothes - Failure to administer caution before test fitting carried out - Evidence inadmissible*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Drugs hidden in a bag in spare tyre compartment of car - Whether accused had knowledge of nature of dangerous drugs - Facts giving rise to several inferences - Inference most favourable to accused to be drawn - Element of possession not proven - Prima facie case of trafficking or possession not proven*

CRIMINAL PROCEDURE: *Impeachment of credit of defence witness - Discrepancies between statement and oral testimony in court - Court not drawn to relevant part of former statement said to be inconsistent with witnesses' evidence in court - Proper procedure for impeachment*

EVIDENCE: *Credibility - Impeachment - Impeachment of witnesses' credit - Discrepancies between statement and oral testimony in court - Court not drawn to relevant part of former statement said to be inconsistent with witnesses' evidence in court - Proper procedure for impeachment*

EVIDENCE: *Statement - Cautioned statement - Test fitting of clothes - Whether test fitting of cloths an action or conduct amounting to statement envisaged in s. 37A(1) Dangerous Drugs Act 1952*

EVIDENCE: *Witness - Credibility - Wife of accused - Whether value of testimony diminished - Credit of witness unscathed*

A The 2nd accused was the driver and the 1st accused was the passenger of a car which was stopped by police officers. According to the police officers, both the accused attempted to flee, but after a scuffle both of them were handcuffed. Nothing incriminating was found on the persons of both accused. However, a black plastic bag
B containing five compressed slabs of dried leaves suspected to be cannabis was found in the spare tyre compartment in the boot of the car. Two travelling bags containing clothes were also found in the boot of the car. The clothes fitted the 1st and 2nd accused upon being tested on them. Both the accused were charged with
C trafficking dangerous drugs (3,919.6 grams of cannabis) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The prosecution submitted that both the accused had common intention to possess the cannabis found in the car. The accused, *inter alia*, claimed that: (i) there was no evidence as to usage of the car prior
D to arrest; (ii) there was no evidence who put the cannabis in the spare tyre compartment; (iii) that the cannabis were kept out of sight even if one were to open the car boot; (iv) that there was no evidence of odour of the exhibits permeating the inner cabin of the vehicle; and (v) that no direct evidence was adduced to show they
E were aware of the cannabis. SP8 (the wife of the 1st accused) who was the registered owner of the car testified that their relatives also used the car. None of the relatives were called. The prosecution relied on the presumption provision under s. 37(da) to prove trafficking and thus had to prove actual possession.

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Held (acquitting and discharging both accused without calling for their defence):

(1) Not in every episode of flight can guilty knowledge be imputed
G to the accused. The police report (P40) made by the police, a contemporaneous document was totally silent about both the accused fleeing. The defence denied that both the accused ran away. This challenge was supported by the glaring omission in P40 as to any scent of fleeing. The prosecution did not offer
H any explanation for this omission. Further, the learned deputy in his opening statement stated that both accused were apprehended in their respective seats in the car. As such, the evidence about the accused running away from the car was doubtful. (paras 10, 11 & 12)

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(2) In the course of SP8 giving evidence, the learned deputy informed the court that he intended to impeach the credit of SP8. However, the court was not drawn to the relevant part of the former statement of SP8 which was said to be inconsistent with her evidence in court. The proper procedure for impeachment as set out in *Muthusamy v. PP* was ignored by the learned deputy. (para 15)

(3) The credit of SP8 remained unscathed. Although SP8 was the wife of the 1st accused, this did not diminish the slightest bit the value of her testimony. She gave evidence in a straight forward manner. (para 16)

(4) No caution was administered before the test fitting of the clothes was carried out. The act of this demonstration can be equated with a statement, and therefore the safeguards of a statutory caution would apply. The test-fitting of the clothes by both accused were action or conduct amounting to statement envisaged in s. 37A(1) of the Act and as no prior caution was administered, the conduct of test-fitting were inadmissible. (paras 21, 22 & 26)

(5) In relation to common intention, the prosecution must establish that there was a pre-arranged plan to traffick the cannabis which formed the subject matter of the charge and that the said trafficking was carried out in concert pursuant to that pre-arranged plan. There was no evidence to show the accused had pre-conceived plan to traffick the drugs. (para 33)

(6) The prosecution had to establish that both the accused had, not only custody and control of the black plastic bag in the spare tyre compartment, but also knowledge that the bag contained the proscribed drugs. The said bag was well hidden from sight, even if one were to open the car boot. It was covered by a carpet. These facts admitted several inferences, including that they were unaware of the existence of the bag, what more, its contents. As the inference most favourable to the accused must be drawn, an essential element of the offence charged that is, possession had not been proven. The prosecution therefore had not proved a *prima facie* case of trafficking or possession. (paras 34 & 35)

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Asdanusi Daut & Anor v. PP [2004] 3 CLJ 669 CA ***(refd)***
Dato' Mokhtar Hashim v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Krishnan Marimuthu & Anor v. PP [1982] CLJ 186; [1982] CLJ (Rep) 152 FC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Muthusamy v. PP [1947] 1 LNS 71 ***(refd)***
Noor Mohammad Mohd Yusuf Momin AIR [1971] SC 855 ***(refd)***
Ong Joo Chin v. R [1946] 1 LNS 36 ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Cheah Ooi Por & Anor (Criminal Trial No: 45-12-95) (Unreported) ***(refd)***
PP v. Hafiszamri Ahmad & Anor [2007] 1 CLJ 285 CA ***(refd)***
PP v. Ibrahim Mahmud [2001] 3 CLJ 284 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Ramli Shafie [2002] 8 CLJ 846 ***(refd)***
PP v. Tan Tuan Seng [1993] 2 CLJ 557 HC ***(refd)***
PP v. Yap Boon Chang [1992] 2 CLJ 1257; [1992] 3 CLJ (Rep) 454 HC ***(refd)***
Saad Ibrahim v. PP [1967] 1 LNS 154 ***(refd)***
Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] CLJ 188; [1982] CLJ (Rep) 340 HC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 37A(1), 39B(1)(a)
Evidence Act 1950, ss. 8, 9, 145(1), 155(c)
Penal Code, s. 34

Penal Code [Ind], s. 34

For the prosecution - Azman Abu Hassan DPP
For the defence - Ranjit Singh Dhillon; M/s J Kaur, Ranjit & Assoc

Reported by Amutha Suppayah

JUDGMENT

Zamani A Rahim JC:

[1] Both the accused are charged with trafficking dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act').

Amended Charge

Bahawa kamu bersama-sama pada 1 Disember, 2004 jam lebih kurang 2.30 petang di hadapan sebuah rumah nombor 68, Kampung Seberang Alor, Kuala Perlis di dalam Daerah Kangar, di dalam Negeri Perlis telah di dapati mengedar dadah berbahaya iaitu Cannabis seberat 3,919.6 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama, dibaca bersama Seksyen 34 Kanun Keseksaan.

Brief Facts Of Case

[2] The 2nd accused was the driver of a black Proton Perdana bearing registration number BFC 1306 and the 1st accused was the passenger in the car seated in the front seat, next to the driver. Acting on information received, the car was stopped by police officers in front of house No. 68, Kampung Seberang Alor, Kuala Perlis, Kangar on 1 December 2004 at about 2.30pm. Both the accused purportedly attempted to flee (disputed by the defence).

[3] A body search was conducted on both the accused but nothing incriminating were found on their person. On further search, the police opened the boot of the car. A black plastic bag containing five compressed slabs of dried leaves suspected to be cannabis were retrieved from the spare tyre compartment. It was hidden from sight. Two clothes bags were also found in the boot of the car but not in its spare tyre compartment.

[4] A police report was lodged *vide* Kuala Perlis Report No: 1337/2004, P40 in respect of the arrest of both the accused and seizure of the drugs.

[5] The five slabs of dried leaves were analysed by the government chemist who confirmed they were cannabis as defined in s. 2 of the Dangerous Drugs Act 1952, weighing a total of 3,919.6 grammes.

A **Possession In Law**

[6] The prosecution is relying on the presumption provision under s. 37(da) as a vehicle to prove trafficking. That being the case, the prosecution is barred from invoking another presumption provision of
B possession under s. 37(d) as it violates the rule in *Muhammad Hassan*. Instead the prosecution is seeking to prove actual or affirmative possession. In taking this path, the prosecution has placed an onerous burden on their shoulders. In the Court of Appeal decision in *PP v. Hafiszamri Ahmad & Anor* [2007] 1 CLJ
C 285, Hassan Lah JCA made the following observations at p. 294.

> What constitutes possession? In *Public Prosecutor v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457, the Federal Court has made the following observation on this point.
>
D [13] Now, as to what the ingredients of possession in law has been established by a long line of cases. We find it unnecessary to discuss all of them here. Suffice that we refer to two of them. In *Toh Ah Loh & Mak Thim v. R* [1948] 1 LNS 72, Gordon-Smith Ag CJ when delivering judgment of the Singapore Court of Appeal explained the meaning in law of the word 'possession' when
E appearing in the statute. His Lordship said:
>
> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and
F lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

[7] The second is *Saad Ibrahim v. Public Prosecutor* [1967] 1 LNS
G 154 where Yong J stressed the necessity of establishing the ingredient of knowledge on the part of an accused before he could be incriminated with possession. His Lordship there said:

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain
H characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raised no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases create by statute, which is not
I applicable in this case.

We would also mention the learned judgment of Lim Beng Choon J in *Public Prosecutor v. Badrulsham bin Baharom* [1987] 1 LNS 72, which contains a full discussion of the several cases on the point.

We accept these authorities as correctly stating the law. It follows that where the prosecution seed to prove trafficking by relying on s. 37(da), it must prove at the trial, all the ingredients of possession set out in the cases of *Toh Ah Loh* and *Mak Thim* and *Saad Ibrahim*.

Drugs Found In The Tyre Compartment Of The Car

The Learned Deputy's Submission

[8] The learned deputy submitted that the Proton Perdana BFE 1306 in which the cannabis were found was registered in the name of SP8. SP8 is the wife of the 1st accused. According SP8, the 1st accused sent her home at Jalan Kelang Lama, Kuala Lumpur with the car BFE 1306 at about 1am. The 1st accused was the last person to use the car. There were no drugs in it. The car was stopped and detained by the police at about 2.30pm on the same day. Only the 1st and 2nd accused were inside the car. No one else. Upon examining, the cannabis were found in the tyre compartment in the boot of the car. Together with the cannabis, two travelling bags containing clothes were also found. The clothes fitted the 1st and 2nd accused upon being tested on them. The cannabis could only be placed in the car from the moment the 1st accused used it until it was detained by the police. The car was approximately 13 1/2 hours in the possession of the 1st accused. Therefore, it was submitted by the learned deputy that the cannabis was brought into the car after the 1st accused gained possession of the car. As no evidence to show other persons had access to the car, the cannabis found therein were in the custody and control of the 1st and 2nd accused who were the only occupants at the time the detention of the car. However, this proposition runs contrary to what was said in *PP v. Tan Tuan Seng* [1993] 2 CLJ 557 having considered the presumption under s. 37(d) and considered several authorities including House of Lords case of *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356, Supreme Court case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, *Syed Ali Syed Abdul Hamid & Anor v. PP* [1982] CLJ 188; [1982] CLJ (Rep) 340, Visu Sinnadurai J said as follows:

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> Therefore, quite clearly it cannot be said that by the mere fact that the accused had custody or control of the car, he is deemed to be in possession of the drugs found in it.

And the Federal Court case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, in allowing the appeal, Arifin Zakaria FCJ (as he then was) said *inter alia*:

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> But mere custody and control is not sufficient to establish possession for the purpose of the Act, there has to be established knowledge of such drug by the respondent.

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The next ingredient to constitute possession is knowledge. Knowledge is an element of a state of mind must be judged from outward acts or omissions. Both of the accused guilty knowledge may be inferred from their conduct. The learned deputy relied on the testimony of SP6 as regard to the accused conduct. SP6 said in his evidence as follows:

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> Saya telah beri arahan untuk buat serbuan dan telah berjaya menahan kereta berkenaan dengan menghalang menggunakan kereta pacuan 4 roda yang saya naiki dihadapan kereta Proton Perdana itu.

E

> Seterusnya saya bersama anggota-anggota dalam kereta saya telah turun daripada kenderaan menghala kearah kereta Proton Perdana dan saya telah memperkenalkan diri sebagai Pegawai Kanan Polis dengan menunjukkan kad kuasa saya. Sejurus selepas itu, 2 orang lelaki yang berada di dalam kereta Proton Perdana warna hitam

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> cuba melarikan diri. Namun demikian, kedua-duanya berjaya ditangkap berhampiran dengan kereta tersebut sejurus saya memperkenalkan diri saya.

> Kedua-dua lelaki yang berada di tempat duduk pemandu dan di sebelahnya di hadapan telah keluar melarikan diri dalam keadaan

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> kelam kabut dan agak ketakutan.

> Semasa tangkapan berjaya dibuat, satu pergelutan telah berlaku di antara kedua-dua lelaki berkenaan dengan anggota saya di mana saya dan D/SM Ahmad bin Ishak telah menangkap satu lelaki iaitu

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> pemandu kereta berkenaan, manakala ASP Shaari bersama D/Kpl Mohd. Suhaimi bin Ismail telah menangkap lelaki yang berada di sebelah tempat duduk pemandu, setelah berlaku pergelutan.

> Seterusnya SP6 berkata lagi:

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> Saya bawa OKT1 dan OKT2 dari tempat di tangkap ke kereta, jaraknya lebih kurang 10 meter.

According to SP6, when the car was blocked and having identified himself as a police officer, both the accused attempted to flee in fright. A scuffle ensued for about 3 to 5 minutes before both the accused were handcuffed. This was conduct of having guilty mind, argued by the learned deputy. The evidence of conduct was admissible under s. 8 of the Evidence Act and by virtue of s. 9 of the same Act, both the accused have to explain it: see *Parlan Dadeh v. PP* [2009] 1 CLJ 717.

As the conduct of both the accused showed that there were "meeting of the minds", they had common intention to possess the cannabis found in the car. And as the cannabis herein was for in excess of 200 grammes, the prosecution has therefore proved the case of trafficking in cannabis against both the accused under s. 39B of the Dangerous Drugs Act, 1952. It would appear that the prosecution was replying on actual or affirmative possession of the drug by the both the accused. On my interjection, the prosecution confirmed that it was not relying on the presumption of possession under s. 37(d) of the Act at all. It stands or fall on proof of *mens rea* possession as opposed to presumed possession.

The Learned Counsel Contention

[9] As regard custody and control of the car, the learned counsel contended that all the prosecution has established are the following scattered pieces of evidence, namely:

(a) The wife, SP8 who was the registered owner of the car testified that all and sundry had access as well as the use of the car;

(b) No evidence as to usage of the car prior to arrest;

(c) No evidence who put the cannabis in the spare tyre compartment in the car boot of the car;

(d) The cannabis were kept out of sight even if one were to open the car boot;

(e) The wife, SP8 testified that relatives used the car, none of the relatives were called, when did they last use it but more importantly no evidence whether they had put the exhibits in the car;

(f) No evidence of odour of the exhibits permeating the inner cabin of the vehicle or rather no evidence of smell at all during the arrest;

(g) Lack of knowledge of the cannabis. Absolutely no direct evidence was adduced by the prosecution to show both the accused were aware of the cannabis. In fact even if they had known of the existence of the black plastic bag that does not mean that they knew the contents. The prosecution did not rely on the presumption of possession under s. 37(d);

(h) No evidence of both the accused persons having been observed prior to the arrest; and

(i) The prosecution did not have any other evidence such as of any finger prints of the accused on the plastic packets containing the drugs to show some form of nexus between the accused and the exhibits.

[10] As regard knowledge, the learned counsel contended that the most poignant piece of evidence telling against both the accused was the attempt to flee at the time of arrest. The act of fleeing from the scene showed guilty minds of both the accused or they knew the existence of the cannabis in the tyre compartment of the car. The prosecution evidence on this issue must not be accepted blindly, but must be subjected to a maximum evaluation. Clearly, not every episode of flight can guilty knowledge be imputed to the accused.

[11] In this case, it is strange that the police report, P40 a contemporaneous document was totally silent about both the accused fled from the car. Here the defence challenged the fact that both the accused ran away. This is not an empty challenge. This challenge is supported by the glaring omission in P40 as to any scent of fleeing. The prosecution did not offer any explanation as to this gaping hole in its narrative. Neither did the prosecution attempt to offer any reasons for the omission at all. This state of utter uncertainty as to the episode of fleeing is further compounded, if one were to refer to the learned deputy opening statement, P3 which reads as follows:

> Terdapat dua (2) lelaki India dalam kereta tersebut iaitu B1 dan B2 cuba melarikan diri tetapi berjaya ditahan. **B1 ditahan ditempat duduk disebelah penumpang hadapan dan B2 memandu kereta tersebut.**

[12] Now, SP6 said both the accused were arrested near the car. It means outside the car. But the learned deputy's statement, they were apprehended in their respective seats in the car – the 1st accused on the front passenger seat, whilst 2nd accused on the driver's seat. At such SP6's evidence about the accused running away from the car is doubtful. Failure to mention a critical and important point in the police report and the learned deputy's opening statement, in the Court Appeal case of *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773 the following observations were made by Gopal Sri Ram JCA (as he then was) at p. 781.

> Now, it is clear from the record provided to us that the first occasion on which the suggestion was made that the accused was carrying exh P15 when the emerged from the apartment block in question was during PW5's testimony. This fact found no mention in the police report lodged by PW5 after the accused's arrest, a matter readily admitted by the witness. Neither did this fact find any mention in the opening statement made by the learned deputy public prosecutor in the court below. If PW5 and PW6 had in their statements to the investigating officer mentioned the fact that each had seen the accused carrying exh. P15 as the material time it is reasonable to have expected the prosecution to state this as part of its case in its opening statement. Because, it is a fact of such critical importance to establish the element of trafficking. We are therefore satisfied for reasons different from those given by the learned judge that the prosecution had not on a maximum evaluation of its evidence at the close of its case established a *prima facie* case of trafficking.

[13] Omission of important matter in the police report was the object of a scathing remark by the Federal Court in *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1 where his Lordship Abdul Aziz Mohamad FCJ said at pp. 24-25 as follows:

> The consequences of an omission to state an important matter in the FIR have been mentioned in several Indian authorities, of which the following may be cited. In *Sher Ali v. Emperor* (29) AIR [1942] Pesh 51, at p. 52 C2, the story of an incident related by a witness was held to be rightly disbelieved by the trial court because the witness did not mention the incident in the FIR that he had made. In *Ramlal Singh v. State* AIR (45) [1958] MP 380, paragraphs (12), (13), HR Krishnan J disagreed with the Sessions judge in being very greatly impressed by a boy witness's account of the happening because it was not mentioned in the FIR of the person to whom the boy must have related what he saw if he had seen it. He said

A that the FIR "is a piece of corroborative evidence, omissions in it will, other things being the same, deprive prosecution of the most valuable corroboration and thereby make the story suspicious". In *Hari Nath v. Sate of UP* AIR [1988] SC 345, one at least of several eye-witnesses to a dacoity could reasonably be expected to have known some of the appellants, but the identity of the culprits was not disclosed in the FIR. At paragraph 7, Venkatachaliah J said: "The omission to disclose their identity in the FIR would raise a reasonable doubt about their complicity in the crime."

[14] His Lordship went on to conclude his judgment on this point C at p. 27 as follows:

The logic is simple, if it was true that Hassan Lee, as he said in evidence, saw the appellants chased Sanip, by the natural course of human conduct he would have mentioned the fact in the FIR. Since he did not, and he failed to give a reasonable explanation for the D omission, the truth of his evidence becomes open to at least a reasonable doubt.

The Wife's Testimony, SP8

[15] In the course of SP8 giving evidence, the learned deputy E informed the court that he intended to impeach the credit of SP8. Most probably her former statement which was given to the police was inconsistent with her evidence in court. This prompted the learned deputy to inquire whether SP8 would like to refer to her F statement. Obviously this was to refresh her memory. SP8 replied that she did not wish to refer to her statement. The learned deputy did not proceed further. He appeared to be oblivious of the provision of s. 155(c) read together with s. 145(1) of the Evidence Act. The court was not drawn to the relevant part of the former statement of SP8 which is said to be inconsistent with her evidence G in court: see *Ong Joo Chin v. R* [1946] 1 LNS 36. The proper procedure for impeachment should be made on the lines set out by Taylor J in *Muthusamy v. PP* [1947] 1 LNS 71, but it was ignored by the learned deputy. *Muthusamy*'s case was endorsed and approved by the Federal Court in the case of *Krishnan Marimuthu & Anor v.* H *PP* [1982] CLJ 186; [1982] CLJ (Rep) 152. Be that as it may, the immediate order of impeaching the credit of a witness once a material discrepancy is discovered is inappropriate, but such a witness must be considered as a whole with the rest of the evidence at the end of the prosecution case as advocated by Abdoolcader FJ I (as he then was) in the Federal Court case of *Dato' Mokhtar bin Hashim v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101.

[16] In this case, the credit of SP8 remained unscathed. Although SP8 is the wife of the 1st accused, this does not diminish the slightest bit the value of her testimony. In fact, she gave evidence in a straight forward manner, showing no signs of embarrassment at all. Both the prosecution and defence may rely on her evidence for whatever it is worth. The judicial appreciation of the evidence of the wife of the accused was described by Augustine Paul J (as he then was) in *PP v. Ramli Shafie* [2002] 8 CLJ 846 at p. 860 as follows:

> The fact that PW3 is the wife of the accused does not disentitle her to credence, contrary to the submission of the learned deputy public prosecutor, until cogent reasons for disbelief have been advanced (see *Balasingham v. PP* [1959] 1 LNS 8; *Rattan Singh v. PP* [1970] 1 LNS 132), no such evidence was adduced by the prosecution.

[17] This principle is further reinforced by Vincent J (as he then was) in the case of *PP v. Yap Boon Chang* [1992] 2 CLJ 1257; [1992] 3 CLJ (Rep) 454 in the following words:

> However, it is settled law that there is no legal presumption that an interested witness (if STI was found to be one) should not be believed; he or she is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.
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> See *Public Prosecutor v. Foong Chee Cheong* [1969] 1 LNS 128 wherein witness was related to the deceased and *Liow Siow Long v. Public Prosecutor* [1969] 1 LNS 98 wherein no such cogent reasons were adduced in evidence or elicited from cross-examination.

[18] Let us now examine the evidence of SP8 with a curial scrutiny. The following salient points appear, namely:

(a) Apart from her, her husband, father in law, brother in law and her husband's employees have free and unrestricted use of the car;

(b) She did not know when was the last time she examined the interior of the car;

(c) She never examined the spare tyre compartment in the boot of the car;

(d) She was unable to recollect when was the last time when the class of persons mentioned above had use of the car, ie, father in law, brother in law and her husband's employees used the car; and

A (e) There was no evidence that the travelling bags/clothes bags were placed there by the accused or belonged to the accused at all.

(f) No questions were posed to SP8 whether the clothes in the bags belonged to the accused.

B **[19]** Bearing in mind that SP8 wears the badge of a prosecution witness, her evidence would give rise to a number of factual permutations as surfaced in the case of *PP v. Ibrahim Mahmud* [2001] 3 CLJ 284. His Lordship Vincent Ng J (as he then was) juggled these possibilities at p. 299 as follows:

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> By their failure to call Wahid and Yusuf (the two nephews), the prosecution has unwittingly projected and equivocation in terms of at least three probable factual permutations, namely: the accused was in exclusive possession of the offending drugs to the exclusion
> D of all persons including the two nephews; both or either one of the two nephews was is exclusive possession of same to the exclusion of the accused and all persons; and the accused together with his two nephews were in exclusive possession to the exclusion of the rest of the world, in which event all three of them should have been jointly charged – on a charge framed in conjunction with s. 34 of
> E the Penal Code.

[20] In view of the aforesaid myriad of probable inferences, the benefit of the doubt must be given to the accused.

F **Test Fittings Of Clothes By Both Accused**

[21] In the course of investigations, both the accused were subjected to a test fitting of the clothes found in the respective travelling bags. Interestingly enough, the investigating officer candidly admitted that no caution was administered before the test
G fitting was carried out.

[22] The act of this demonstration can be equated with a statement, and therefore the safeguards of a statutory caution would apply to cover any admissions or confessions, including actions of
H the accused tantamount to statement.

[23] In the Court of Appeal case of *Y. Jeyamuraly Yesiah v. PP* [2007] 5 CLJ 605, a majority decision held that the conduct of the appellant, namely, in picking up a biscuit tin and handing it to SP4 in response of her request to hand over any prohibited item in
I his custody or under his control amounts to a statement which fall

within the contemplation of s. 37A of the Act. The majority decision are of the view that the word "statement" appearing in s. 37A of the Act must be construed as including actions.

[24] The majority decision held at p. 632 as follows:

> Thus, we hold that actions such as pointing or nodding or handing over physically an item in response to a question or request are statements within the contemplation of s. 37A of the Act or is tantamount to information received from a person accused of any offence in the custody of a police under s. 27(1) of the Evidence Act 1950 depending upon the circumstances of the case.

[25] Similarly, in the Penang High Court Criminal Trial No: 45-12-95 *PP v. Cheah Ooi Por & Anor* (unreported). His Lordship Jeffery Tan J (as he then was) at p. 14 of the judgment, in upholding the objection of the defence had this to say:

> Defence counsel, however lodged a strong objection to the admission of the evidence – that OKT1 was requested by the investigation officer to try on P160, the pair of trousers with the pager hanging in the middle hall, and it fitted OKT1 – which the prosecution intimated it was proceeding to adduce. It was not in dispute the statutory caution under s. 37A(1)(b) was not read to the accused, but the prosecution however contended that the intended evidence was not a statement within the meaning of s. 37(1) of the Act, and therefore admissible despite the absence of a caution.
>
> However, spoken words by an accused is not the only form of statement envisaged in s. 37A requiring a caution to be read to an accused after his arrest before it can be admitted.
>
> In *PP v. Siew Sung* [1965] 1 LNS 140, Ong Hock Thye Ag, CJ (as he then was) held as inadmissible, having regard to s. 113 of the CPC (which is in *pari materia* with proviso (b) to s. 37A(1)), evidence that 2 days after the raid the accused came to the police station and opened a pin table. In *Lim Kah Wan v. PP* [1985] 2 CLJ 473; [1985] CLJ (Rep) 530, Edgar Joseph Jr J (as he then was) held the nodding of the accused's head as part of the accused's verbal statement that led to the discovery of a fact, and hence admissible under s. 27(1) of the Evidence Act (see also *Lee Lian & Ors v. PP* [1956] 1 LNS 54 where Thompson J (as he then was) held that "statement must be construed as including actions such as pointing out a person.

A In the instant case, while the testing on of P160 was not a verbal statement from the accused, yet the message from the act was equally audible, and was a statement envisaged by s. 37A(1) and inadmissible without a prior caution. The prosecution's application to adduce that evidence was accordingly rejected.

B **[26]** Applying the above principle to the facts in this case, I hold that the test-fitting of the clothes by both accused are action or conduct amounting to statement envisaged in s. 37A(1) and as no prior caution was administered, the conduct of test-fitting were inadmissible.

C

Common Intention

[27] The provision of common intention under s. 34 of the Penal Code reads as follows:

D When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[28] Our s. 34 of the Penal Code is in *pari materia* with s. 34 of E the Indian Penal Code. In the Indian case of *Noor Mohammad Mohd Yusuf Momin* AIR [1971] SC 855, the Supreme Court observed as follows:

So far as section 34 Indian Penal Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the F essence of that liability being the existence of a common intention, participation in the commission of the offence in furtherance of the common intention invites its application.

[29] In the Supreme Court case of *Shamsuddin Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428, His Lordship, G Harun Hashim SCJ (as he then was) dealt with s. 34 of the Penal Code as follows:

In the instant case, the learned judge has not dealt at all with s. 34 of the Code in respect of common intention. Indeed s. 34 of the H Code was not inserted in the charge until the day the trial commenced. Be that as it may, it is essential that there should be evidence of a common intention, or evidence from which such common intention can properly be inferred, to commit the act actually committed: see *Lee Yoon Choy Ors v. PP* quoting with I approval *Mahbub Shah v. King-Emperor*. The mere fact of a bundle being thrown out of the car is not evidence of common intention or evidence from which can properly be inferred.

[30] His Lordship then concluded at best the evidence showed that one of the appellants must had custody or conduct of the drugs to throw it out of the car. However, the question was who? He then likened the situation to the following:

> In *R v. Abbott* [1955] 2 All ER 899 CCA, Lord Goddard CJ cites a case at p. 901:
>
> In which two sisters were indicated for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

[31] The case of *R v. Abbot (supra)* was cited and approved in the Supreme Court case of *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1, (per Edgar Joseph SCJ (as he then was) at p. 5 of the decision) and the Court of Appeal decision in *PP v. Hafiszamri Ahmad & Anor* [2007] 1 CLJ 285.

[32] This concept was underscored in the Court of Appeal decision of *Asdanusi Daut & Anor v. PP* [2004] 3 CLJ 669. His Lordship Gopal Sri Ram JCA (as he then was) had this to say at p. 672:

> As both appellants were charged with having committed the offence with common intention, it was incumbent on the prosecution to establish that ingredient. As to what amounts to common intention, Augustine Paul J in *Public Prosecutor v. Mohd Farid* [2002] 8 CLJ 814 said:
>
> It is essential that the participants have some knowledge that an act may be committed which is consistent with or would be in furtherance of the common intention. The prosecution must establish that there was a prearranged plan to commit a criminal act and the crime forming the subject matter of the charge was done in concert pursuant to that prearranged plan (see *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, *Ong Chee Hoe & Anor v. PP* [1999] 4 SLR 688). It is difficult to prove common intention by direct evidence. It is usually inferred from the facts of a particular case.

A In *Public Prosecutor v. Mohd Farid bin Mohd Sukis & Anor* [2002] 8 CLJ 814, the same learned judge said:

> The law that I have discussed shows that in order to establish that the accused persons acted with common intention, the prosecution must show that there is a link between them with regard to the
B cannabis that was recovered.

[33] The learned deputy submitted that as the conduct of both the accused showed that there were "meeting of minds", they had common intention to possess the cannabis found in the car. That
C is too simplistic a submission. As to what amount to common intention, it is essential that OKT1 and OKT2 have some knowledge that an act may be committed which is consistent with or would be in furtherance of the common intention. It is not sufficient if both of them has identical or similar intention. The
D prosecution must establish that there was a pre-arranged plan to traffick the cannabis which form the subject matter of the charge. The said trafficking was carried out in concert pursuant to that pre-arranged plan. In this case, there is not a morsel of evidence forthcoming from the prosecution to even suggest both the accused
E had pre-conceived plan to traffic the drugs.

Decision Of This Court

[34] On the present facts, the prosecution had to establish that both the accused had, not only custody and control of the black
F plastic bag in the spare tyre compartment, but also knowledge that the bag contained the proscribed drugs. The said bag was well hidden from sight, even if one were to open the car boot. It was covered by a carpet. We have already recited the most telling facts against the accused. Those telling facts may admit of several
G inferences, including that they were unaware of the existence of the bag, what more, its contents. As the inference most favourable to the accused must be drawn, it is clear that an essential element of the offence charged that is, possession has not been proven.

H **[35]** Upon maximum evaluation of the prosecution evidence and the surrounding circumstances as guided by the Court of Appeal case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and the Federal Court case of *Mohd Radzi bin Abu Bakar, supra,* this court is not satisfied that the prosecution has proved a *prima facie* case,
I not only on trafficking but also possession. Both the accused are, accordingly, acquitted and discharged without calling for their defence.